

2007 Montana Legislature

About Bill -- LinksSENATE BILL NO. 345 -- WITH DRAFT AMENDMENTS

INTRODUCED BY B. HAWKS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING SETBACK REQUIREMENTS FOR CERTAIN STREAMS; REQUIRING POLITICAL SUBDIVISIONS TO ESTABLISH SETBACK REGULATIONS; AUTHORIZING POLITICAL SUBDIVISIONS TO ISSUE VARIANCES AND COLLECT FEES; AUTHORIZING POLITICAL SUBDIVISIONS TO ADOPT LOCAL REGULATIONS IN LIEU OF STATE STANDARDS THAT MEET CERTAIN REQUIREMENTS; PROVIDING FOR ENFORCEMENT AND PENALTIES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 10] may be cited as the "Montana Stream Legacy Act".

NEW SECTION. Section 2. Intent, findings, and policy. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Stream Legacy Act. It is the legislature's intent that the requirements of [sections 1 through 10] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) The legislature finds that:

(a) impacts of development on Montana's rivers and streams, including increased downstream erosion and diminished water quality, are often manifested across local government jurisdictional boundaries;

(b) the state has a duty and legitimate interest in protecting the integrity of its rivers and streams on behalf of all its citizens;

(c) the state has a duty and legitimate interest in protecting people and private property by reducing property loss from flooding and erosion;

(d) maintenance of the integrity of rivers and streams is crucial to the quality and quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use;

(e) rivers and streams are highly susceptible to impacts from land development;

(f) fish and wildlife that rely on rivers and streams for habitat belong to all Montanans;

(g) development practices on lands adjacent to rivers and streams in many cases are causing excessive and unnecessary damage to the banks, beds, and protective vegetation of the state's rivers and streams; and

(h) through careful management of the lands adjacent to rivers and streams, property owners and developers can achieve their goals without sacrificing water quality or impairing the beneficial uses of the water.

(3) The legislature recognizes that Montana's rivers and streams provide important natural resources that belong to the people of the state and that support the economy, the environment,

1 and the quality of life that Montanans enjoy. It is the policy of the state to ensure that
2 development along rivers and streams proceeds in a way that:

- 3 (a) protects property from flooding and erosion;
- 4 (b) protects water quality and quantity;
- 5 (c) provides opportunities for recreation;
- 6 (d) protects valuable water recharge areas;
- 7 (e) preserves fish and wildlife habitat; and
- 8 (f) preserves the use and enjoyment of private property.

9 (4) The legislature recognizes that development along the state's rivers and streams occurs at
10 differing levels in different regions of the state. It is the intent of the legislature to provide local
11 governments with the flexibility to implement the provisions of [sections 1 through 10] in a
12 manner that best suits the needs of the citizens of each county.

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14 **NEW SECTION. Section 3. Definitions.** When used in [sections 1 through 10], unless a
15 different meaning clearly appears from the context, the following definitions apply:

16 (1) "Channel migration zone" means the area where it is reasonably foreseeable that an active
17 channel of the stream could migrate in the next 100 years because of erosion or avulsion.

18 (2) "Flood plain" has the meaning provided in 76-5-103.

19 (3) "Flood prone areas" mean ~~those areas the area~~ adjacent to a stream that ~~is are~~ predicted to
20 be covered by the floodwater of a flood of ~~one hundred~~ 100-year frequency, based on

21 (a) an analysis of elevation ~~only~~, without taking into account channel restrictions such as
22 bridge abutments and obstructions, and

23 (b) if appropriate, aerial photographs of past floods.

24 (24) "Ordinary high-water mark" has the meaning provided in 23-2-301.

25 (5) "Person" means an individual, firm, partnership, company, commercial entity,
26 corporation, or association.

27 (36) "Political subdivision" means any incorporated city or town, a consolidated government,
28 or a county.

29 (47) "Setback" means an area of varying width adjacent to a stream where certain uses have
30 the potential to significantly affect private property, wildlife habitat, water quality, fish, or other
31 aquatic resources. Setbacks may not be smaller than the vegetative buffer.

32 (58) (a) "Tier I streams" includes the following streams as defined by the United States
33 geological survey, excluding lakes and reservoirs:

34 (ai) Beaverhead River;

35 (bii) Big Hole River;

36 (eiii) Bighorn River;

37 (div) Bitterroot River;

38 (ev) Bitterroot River, West Fork;

39 (fvi) Blackfoot River;

40 (gvii) Boulder River as it flows through Jefferson County;

41 (hvi) Boulder River as it flows through Park and Sweet Grass Counties;

42 (ix) Clark Fork River;

43 (jx) Clark's Fork of the Yellowstone River;

44 (kxi) Clearwater River;

45 (lxii) Dearborn River;

46 (mxiii) East Gallatin River;

1 (~~ix~~) Flathead River;
 2 (~~ox~~) Flathead River, Middle Fork;
 3 (~~px~~) Flathead River, North Fork;
 4 (~~qxvii~~) Flathead River, South Fork;
 5 (~~rxviii~~) Gallatin River;
 6 (~~sxix~~) Jefferson River;
 7 (~~txx~~) Jocko River;
 8 (~~uxxi~~) Judith River;
 9 (~~vxxii~~) Kootenai River;
 10 (~~wxxiii~~) Little Blackfoot River;
 11 (~~xxxiv~~) Madison River;
 12 (~~yxxv~~) Marias River;
 13 (~~zxxvi~~) Milk River;
 14 (~~axxxvii~~) Missouri River;
 15 (~~bxxviii~~) Musselshell River;
 16 (~~exxxix~~) Poplar River;
 17 (~~dxxxx~~) Powder River;
 18 (~~exxxxi~~) Red Rock River;
 19 (~~fxxxxii~~) Rock Creek as it flows through Missoula and Granite Counties;
 20 (~~gxxxxiii~~) Rock Creek as it flows through Carbon County;
 21 (~~hxxxxiv~~) Ruby River;
 22 (~~ixxxxv~~) Shields River;
 23 (~~jjxxxvi~~) Smith River;
 24 (~~kxxxxvii~~) Stillwater River as it flows through Park and Stillwater Counties;
 25 (~~lxxxxviii~~) Stillwater River as it flows through Lincoln and Flathead Counties;
 26 (~~mxxxxix~~) Stillwater River, West Fork, as it flows through Sweet Grass and Stillwater
 27 Counties;
 28 (~~nxxl~~) Sun River;
 29 (~~oexli~~) Swan River;
 30 (~~ppxlii~~) Teton River;
 31 (~~qexliii~~) Thompson River;
 32 (~~rxliv~~) Tongue River;
 33 (~~ssxlv~~) Whitefish River;
 34 (~~txlvi~~) Yaak River; and
 35 (~~uxxlvii~~) Yellowstone River.

36 (b) A tier I stream begins where a United States geological survey map shows its point of
 37 origin and ends where it connects to another tier I stream, below which it takes on a different
 38 name, or where the stream leaves the state.

39 (c) The term includes only the mainstem of the stream, and not the upstream forks or
 40 tributaries of the stream:

41 (68) "Tier II streams" means perennial streams as defined by the United States geological
 42 survey, excluding lakes and reservoirs, that are perennial, direct tributaries of tier I streams, and
 43 that drain an area 25 square miles or greater. A tier II stream begins where a United States
 44 geological survey map shows its point of origin and ends where it connects to a tier I stream. The
 45 term includes only the mainstem of the stream, and not the upstream forks or tributaries of the
 46 stream.

(79) "Vegetative buffer" means the portion of the setback closest to the stream where existing native vegetation is to be maintained to the greatest extent possible or enhanced, except weed control is allowed. Weed control is permitted within the vegetative buffer that is designated to remain undisturbed.

NEW SECTION. Section 4. Setback regulation jurisdiction. (1) With the exception of [section 9], the provisions of [sections 1 through 10] do not apply to:

- (a) incorporated cities and towns;
- (b) unincorporated entities established prior to [the effective date of this act] that are classified as census-designated places by the United States bureau of the census; and are:
 - (i) within the boundary of a metropolitan sanitary sewer district created pursuant to 7-13-11 Title 7, Chapter 13, Parts 1, 22, 23, 30, and 43; and or
 - (ii) are served by that metropolitan sanitary sewer district;
- (c) zoned areas with regulations established on or before [the effective date of this act] that have residential densities of at least 1 unit per acre and are served by municipal sewer and water systems; or

(d) tier I streams or tier II streams regulated by local setback regulations adopted prior to [the effective date of this act] that prohibit all new building construction within 150 feet of streams.

(2) Changes after [the effective date of this act] to local setback regulations adopted prior to [the effective date of this act] must comply with [sections 1 through 10].

NEW SECTION. Section 5. Requirements for setbacks and vegetative buffers. (1) Along Except as provided in subsection (2) along either side of a tier I stream, there must be a setback of at least 250 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 100 feet.

(2) Along either side of a tier II stream, there must be a setback of at least 150 feet, as measured from the ordinary high water mark, that must include a vegetative buffer of at least 50 feet.

(3) Within vegetative buffers, native vegetation must be maintained or enhanced, although weed control is permitted.

(32) When a slope adjacent to the stream rises at a grade of 50% or greater least 1 foot vertically for each 2 feet horizontally for at least 20 feet above the ordinary high water mark and there is no historic evidence of bank erosion exists, the setbacks for a tier I stream is at least on shall be as follows:

i. tier I streams will have a minimum setback of 150 feet, with a vegetative buffer of at least 75 feet; and

ii. tier II streams will have a minimum setback of 75 feet, with a vegetative buffer of at least 50 feet.

NEW SECTION. Section 6. Uses within setback -- authorization. (1) Except as provided in [section 8], the following uses are prohibited within setbacks:

- (a) any type of new building, including new residential, commercial, or industrial structures, or outbuildings such as a garage or shop;
- (b) the installation of a manufactured or prefabricated building;

- (15) 1 (c) new ~~septic tanks and septic tank drain fields~~ onsite wastewater disposal facilities;
2 (d) an addition to an existing building of more than 50% of the square footage of the existing
3 structure; or
4 (e) the construction of a new parking lot or road except when necessary to cross a river or
5 stream.

6 (2) The following uses are authorized in a setback:

7 (a) the lawful use of land or buildings that existed on or before [the effective date of this
8 act]; including: (i) the reconstruction, replacement, or repair of any existing onsite
9 wastewater disposal ~~facilities~~ facility ~~septic tank or septic tank drain field~~ provided ~~if that the~~
10 ~~updated facility is no closer to the stream than the original onsite wastewater disposal~~
11 ~~facility; and~~

12 (ii) the reconstruction or repair of any building destroyed or damaged by accidental causes
13 other than flooding, provided that

14 (A) the original footprint of the building is not exceeded; and

15 (B) the reconstruction or repair is commenced within two years of the date of destruction.

16 (b) any use conducted on property ~~subject pursuant to~~ a hydroelectric project license issued
17 by the federal energy regulatory commission or ~~otherwise~~ located within the licensed project
18 boundary as determined by the federal energy regulatory commission;

19 (c) agricultural uses, except any use that includes a new building serviced by electricity,
20 water, and ~~sewer~~ onsite wastewater disposal facilities and that could be used as a permanent
21 residence;

22 (d) structures and equipment used to collect and transport water from a river or stream for
23 agricultural or industrial uses, including diversion and intake structures, pipes, pumps and
24 pumphouses, and related equipment; and

25 (e) structures and infrastructure related to water-related recreation, including but not limited
26 to such as docks, boat ramps, and fishing access sites; and

27 (f) limited filling for highway, street, and railroad embankments not associated with stream
28 crossings if:

29 (i) reasonable alternative transportation routes outside the setback are not available; and

30 (ii) any encroachment is located as far from the stream channel as possible; and

31 (fg) repair and improvement of existing roads within the setback; and

32 (h) commercial forest practices subject to the provisions of Title 77, Chapter 5, Part 3.

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35 **NEW SECTION. Section 7. Political subdivision administration -- requirements -- fees.**

36 (1) Before January 1, ~~2008~~2009, any political subdivision that has tier I streams ~~or tier II streams~~
37 within its boundaries and is subject to [section 4] must implement a permit or certification
38 program for new construction ~~proposed within the setbacks pursuant to [sections 1 through 10]~~ to
39 ensure that the requirements of [sections 1 through 10] are met.

40 (2) (a) The permit or certification program may be part of local subdivision, zoning, sanitation,
41 floodplain, or other appropriate local review process.

42 (b) An applicant for a permit or certification may appeal a permit or certification decision to
43 the governing body of the political subdivision within 30 days of the issuance of the decision. An
44 applicant who files an appeal must have an opportunity for a hearing on the appeal.

45 (c) A decision by the governing body may be appealed to the court of record within 30 days
46 after the decision of the governing body. The permit or certification program must provide for

1 ~~the appeal, within 30 days after the decision, of a permit or certification decision, with an~~
2 ~~opportunity for a hearing, to the governing body of the political subdivision; an appeal of the~~
3 ~~governing body decision will be to the court of record, within 30 days after the decision.~~

24 (2) A political subdivision may charge a fee to reasonably cover the costs of implementing the requirements of [sections 1 through 10].

25 **NEW SECTION. Section 8. Variances.** (1) A political subdivision ~~may~~ shall adopt variance procedures that address the ~~establish~~ criteria established in subsection (3) for granting variances for uses that otherwise would not be allowed pursuant to [section 6].

26 (2) An application for a variance must include information that the political subdivision considers necessary to evaluate the variance request, including but not limited to a ~~scientific flood plain analysis~~ a delineation of the flood plain boundary on the parcel, plans, maps, and specifications detailing the request. A delineation of the flood plain boundary for the parcel may be required.

27 (3) ~~In evaluating a variance request, the~~ A political subdivision shall consider whether the may grant a variance is upon making the following findings finding that:

28 (a) ~~contrary to the public interest;~~

27 (b) ~~necessary to prevent~~ a literal application of [sections 1 through 10] would result in an unnecessary hardship to the property owner as a result of circumstances unique to the parcel, including but not limited to size, shape, topography, or location and will comply with the purpose of [sections 1 through 10];

28 (c) ~~as small as reasonably possible so that the intent of [section 2] is attained to the greatest degree possible; the variance is not contrary to the public interest, based on a consideration of whether the variance is:~~

26 (di) likely to adversely impact water quality;

27 (eii) likely to increase stream bank erosion;

28 (fiii) likely to increase flood heights or velocity; and

29 (iv) consistent with the general purpose and intent of [sections 1 through 10].

30 (c) the hardship is not the result of the actions of the applicant; and

29 (d) the variance is as small as reasonably possible to accommodate the proposed use while preserving the intent of [section 2] to the greatest degree practicable.

31 (4) The applicant for a variance has the burden of demonstrating that the variance request meets the criteria established in subsection (3) the factors set forth in [subsection 3] presenting a preponderance of evidence to establish that the criteria for granting a variance are met.

30 (5) If the provisions of ~~this act~~ [sections 1 through 10] preclude the construction of structures on an otherwise developable parcel in existence on [the effective date of this act] then the political subdivision shall:

31 (a) ~~find that the political subdivision shall find that an unnecessary hardship exists under subsection 3(a); and~~

32 (b) ~~upon the applicant's compliance with subsection (2), the political subdivision shall issue a variance in conformance with subsection (3)(d).~~

33 **NEW SECTION. Section 9. Local setback standards in lieu of state standards.** (1) (a) A political subdivision may enact local setback standards regulations defining the setback area and

vegetative buffers for in lieu of state standards that comply with the policy established in [section 2(3)]. The provisions of [section 5] do not apply to tier I streams and tier II streams subject to the provisions of the local setback standards within its jurisdiction. Local setback regulations shall apply in lieu of the provisions of [section 5] if they meet the minimum requirements of section.

(b) The setback regulations may:

(i) be part of a local subdivision, zoning, sanitation, floodplain, or other appropriate local review process; and

(ii) define terms.

(2) Locally established setbacks may be of a fixed or variable width and may be larger or smaller than those set forth in [section 5]. Setbacks may be expressed as a numerical distance in feet or by narrative reference to topography or other physical features, provided the setback description establishes a definable setback.

(3) Setbacks must be established at a sufficient width, based on peer-reviewed science scientific studies and local information, to fulfill the purposes set forth in [section 2] by designating an area along tier I streams where the uses prohibited in [section 6] will not occur. The setback areas should generally encompass the areas described in subsections (a) through (d) of this subsection (3). Setbacks need not be set at a width that encompasses the entirety of the areas described in (a) through (d) of this subsection (3) at every point along the stream, as long as the width is reasonably calculated to encompass the following areas in most cases:

Local setback standards adopted pursuant to this section must:

— (a) apply to the entire length of the stream within the jurisdiction of the political subdivision;

— (b) include setbacks based on peer-reviewed science and local conditions that ensure that the prohibited uses in [section 6] do not occur within at least three of the following areas:

(ia) wetlands adjacent to streams;

(iib) flood-prone areas—a 100-year flood plain as determined by either the federal emergency management agency or the department of natural resources and conservation or, in the absence of a designation, a flood plan analysis adopted by a political subdivision;

(iiic) the channel migration zone areas where it is reasonably possible that an active channel of the stream could migrate in the next 100 years because of erosion or avulsion; or and

(ivd) areas adjacent to the stream with slopes greater than 25 %. of steep slopes adjacent to the stream or its flood plain;

(4) Local setback regulations must establish include vegetative buffers that, based on peer-reviewed science scientific studies and local conditions, are wide enough to generally prevent unnatural rates of erosion and sedimentation, protect water quality, and maintain native riparian vegetation.

(5) The numeric distance established in [section 5] may not be used as presumptive maximum or minimum widths for local setbacks or vegetative buffers.

(6) The political subdivision shall prepare a written record in support of its decision to enact a local setback regulation, including references to the peer-reviewed science scientific studies and local information that were used to determine the width of setbacks and vegetative buffers.

(6) Nothing in [sections 1-10] may be construed to limit a political subdivision's authority to enact regulations further limiting uses within setbacks or vegetative buffers, or to enact regulations establishing setbacks and vegetative buffers for watercourses not governed by the provisions of [sections 1 through 10].

(3) A political subdivision may adopt local setback standards for any perennial, intermittent, or ephemeral streams within its jurisdiction.

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3 **NEW SECTION. Section 10. Enforcement -- penalties.** (1) The proper authorities of the
4 political subdivision, in addition to other remedies, may institute any appropriate action or
5 proceeding to ensure that a person who commences a use prohibited under [sections 1 through
6 10] restores the setback and vegetative buffer to the conditions in existence before the prohibited
7 use occurred, prohibited use after January 1, 2008, without certification by a political subdivision
8 or a variance shall restore the waterside management to its original condition before the person
9 disturbed it.

10 (2) The political subdivision may appoint enforcing officers to supervise and enforce the
11 provisions of [sections 1 through 10].

12 (3) A knowing violation of [sections 1 through 10] or any regulation adopted pursuant to
13 [sections 1 through 10] is a misdemeanor punishable by a fine not to exceed \$500 a day.
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16 **NEW SECTION. Section 11. Notification to tribal governments.** The secretary of state
17 shall send a copy of [this act] to each tribal government located on the seven Montana
18 reservations and to the Little Shell Chippewa tribe.
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21 **NEW SECTION. Section 12. Codification instruction.** [Sections 1 through 10] are
22 intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to
23 [sections 1 through 10].
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26 **NEW SECTION. Section 13. Saving clause.** [This act] does not affect rights and duties that
27 matured, penalties that were incurred, or proceedings that were begun before [the effective date
28 of this act].
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31 **NEW SECTION. Section 14. Severability.** If a part of [this act] is invalid, all valid parts
32 that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or
33 more of its applications, the part remains in effect in all valid applications that are severable from
34 the invalid applications.
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37 **NEW SECTION. Section 15. Effective date.** [This act] is effective on passage and
38 approval.
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